EASTACRES DEVELOPMENT SDN BHD

v.

FATIMAH MUTALLIP & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-05-1999(1)]
28 JANUARY 2000

CONTRACT: *Sale and purchase of land - Conditional contract - Vendor to obtain approval of foreign investment committee within 8 months of date of written agreement - Failure thereof - Whether purchasers could repudiate agreement - Whether time of essence - Whether agreement frustrated - Whether purchasers entitled to refund of sum paid*

By virtue of a written agreement, the appellant agreed to sell to the respondents a piece of land. The appellant had an obligation under cl. 6(a) of the written agreement to apply and obtain the approval of the foreign investment committee for the sale of that land to the respondents within 8 months from the date of the written agreement, failing which the said agreement would be annulled. Also, the appellant was to refund all monies paid to it by the respondents within 14 days from the date of receipt of the non-approval. The appellant failed to obtain the approval of the foreign investment committee and the respondents sought for the refund of the sum paid under the said agreement. The appellant refused to refund the sum paid. The sessions court found in favour of the respondents and granted summary judgment. Hence, the instant appeal by the appellant.

The appellant claimed that the written agreement was frustrated as the conditions imposed by the local environmental department had the effect of making it impossible to continue with the project as planned therein.

Apart from the above, the appellant also appealed against the decision of the sessions judge refusing security for costs.

Held:

[1] The appellant did not produce any documentary proof to show that it had made concerted attempts to procure the approval of the foreign investment committee within cl. 6(a) of the written agreement.

[2] Since the appellant failed to obtain the approval of the foreign investment committee for the sale of the said land within 8 months from the date of

the written agreement, the respondents were entitled to repudiate the said agreement as time was the essence of the agreement by virtue of cl. 16 of the said agreement. Thus, the summary judgment granted by the sessions judge in favour of the respondents was rightly and correctly given.

[3] There was no frustration of the written agreement. The environmental department gave its approval for the project and the conditions that were imposed could not, *per se*, render the continuation of the project impossible as alleged. Even if the original layout plans had to be revised or modified as stated in the report of the appellant's consultant engineers, that could not prevent the project from being carried out to its final conclusion.

[4] If the doctrine of frustration applied, the respondents would still be entitled to recover the full amount of the money that was paid to the appellant [*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*].

[5] There was a strong *prima facie* presumption that the appellant would fail in its defence. On this ground alone, the appellant's application for security for costs and the appellant's appeal against the decision of the sessions judge in refusing security should be dismissed forthwith.

[Appeal dismissed.]

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] MLJ 47 ***(refd)***
American Express International Banking Corporation v. Tan Loon Swan [1992] 1 MLJ 727 ***(refd)***
Asia Commercial Bank Ltd v. Kimling Trading Co Pte Ltd [1983] 2 MLJ C xxxvii ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 MLJ 400 ***(refd)***
Bernard v. Williams [1928] 44 TLR 437 ***(refd)***
Berney v. Tronoh Mines Ltd [1949] MLJ 4 ***(refd)***
Chan Buck Kia v. Naga Shipping & Trading Co Ltd [1963] 29 MLJ 159 ***(refd)***
Chandler v. Webster [1904] 1 KB 493 ***(refd)***
Coldham v. The Raub Australian Gold Mining Co Ltd [1940] MLJ 50 ***(refd)***
Crozat v. Brogden [1894] 2 QB 30 ***(refd)***
Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 ***(refd)***
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 ***(refd)***
Government of the Federation of Malaysia v. Lee Tain Tshung [1992] 1 MLJ 629 ***(refd)***
Hare v. Nicoll [1966] 2 QB 130 ***(refd)***
Harold Wood Bricks Co Ltd v. Ferris [1935] 2 KB 198 ***(refd)***
Harrington v. Browne [1917] 23 CLR 297 ***(refd)***
Hartley v. Hymans [1920] 3 KB 475 ***(refd)***
Hirji Mulji v. Cheong Yue Steamship Co Ltd [1926] AC 497 ***(refd)***

Ho Kai Neo (widow) and Chew Swee Yan v. Tan Kim Tee and Tan Kiem Tie Limited [1940] MLJ 84 ***(refd)***
Hogan v. Hogan (No 2) [1924] 2 Ir R 14 ***(refd)***
Hong Guan & Co Ltd v. R Jumabhoy & Sons Ltd [1960] 26 MLJ 141 ***(refd)***
Jaafar bin Ibrahim v. Gan Kim Kin [1985] 2 MLJ 24 ***(refd)***
Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corpn Ltd [1942] AC 154 ***(refd)***
Kasturi Palm Products v. Palmex Industries Sdn Bhd [1986] 2 MLJ 310 ***(refd)***
Khoo Than Sui v. Chan Chiau Hee [1976] 1 MLJ 25 ***(refd)***
Lim Kim Som v. Sheriffa Taibah bte Abdul Rahman [1994] 1 SLR 393 ***(refd)***
Loh Boon Siew v. Chin Kim & Anor [1972] 1 MLJ 139 ***(refd)***
Maritime National Fish Ltd. v. Ocean Trawlers Ltd [1935] AC 524 ***(refd)***
Maybank Finance (Singapore) Ltd v. Yap Thiam Sen & Anor [1991] 1 MLJ 204 ***(refd)***
Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 ***(refd)***
Porzelack KG v. Porzelack (UK) Ltd [1987] All ER 1074 ***(refd)***
Raman Chettiar v. Palaniappa Chettiar & Anor [1939] MLJ 165 ***(refd)***
Ramli bin Zakaria & Ors v. Government of Malaysia [1982] 2 MLJ 257 ***(refd)***
Sabah Development Bank Bhd v. SKBS (Sabah) Sdn Bhd & Ors [1992] 1 MLJ 454 ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 MLJ 151 ***(refd)***
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***
SM Appaduray & Anor v. R. Ananda & Anor [1982] 1 MLJ 292 ***(refd)***
Smith v. Hamilton [1951] Ch 174 ***(refd)***
Subramaniam Dhanapakiam v. Ghaantimathi [1991] 2 MLJ 447 ***(refd)***
Tilley v. Thomas [1867] LR 3 Ch App 61 ***(refd)***
Trident International Freight Services Ltd v. Manchester Ship Canal Co [1990] BCLC 263 ***(refd)***
Tsakiroglou & Co Ltd v. Noblee Thorl GmbH [1962] AC 93 ***(refd)***
Williams v. Greatex [1957] 1 WLR 31 ***(refd)***
Wong Kim Fatt v. Yong Kwet Yin [1996] 1 BLJ 444 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 15, 16
Contracts Act 1950, ss. 57(2), (3), 66
Environmental Quality (Amendment) Act 1985, ss. 34A(6), (8)
Moneylenders Act 1951, s. 3
Rules of the High Court 1980, O. 14
Subordinate Courts Rules 1980, O. 18 r. 1(1), O. 26A r. 1(1)

For the appellant - Wong Hok Chong; M/s Wong Choo & Partners
For the respondents - Tho Kam Chew; M/s Gulam & Wong

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

By a written agreement dated 29 January 1993 (hereinafter referred to as the "written agreement") executed in the appellant's office at Johor Bahru, the appellant agreed to sell and the respondents agreed to buy all that parcel of land located at Mukim Kenaboi, in the district of Jelebu, known as Lot 544 and measuring approximately two (2) acres for the consideration of Singapore Dollars S$46,200. Approximately on 14 January 1993 pursuant to cl. 1 and part 6 of the Schedule to the written agreement, the respondents paid a deposit of Singapore dollars S$17,000 as part payment of the purchase price. Subsequently, the respondents made a second payment of Singapore dollars S$6,100 pursuant to cl. 2 and part 7(a) of the Schedule to the written agreement. Both the receipts of such payments were exhibited collectively and it can be seen at p. 61 and p. 62 of the appeal record. The appellant too admitted having received those two payments and this admission can be seen at para. 3 of the statement of defence as reflected at p. 15 of the appeal record. The appellant in their affidavit affirmed on 8 September 1998 at para. 4 thereof also admitted receiving those two payments.

The appellant had an obligation under cl. 6(a) of the written agreement, at their own cost and expense, to apply for and to obtain the approval of the foreign investment committee for the sale of that land to the respondents within eight (8) months from the date of the written agreement. The date line would be by 29 September 1993 failing which the written agreement shall be deemed annulled and the appellant was to refund all monies paid within fourteen (14) days from the date of receipt of the non-approval. Lest I be accused of paraphrasing, I shall now reproduce cl. 6(a) of the written agreement:

> 6. Upon the execution of the Agreement the vendor shall, at its own cost and expense, forthwith apply for
>
> a. the Foreign Investment Committee's approval, if required, for the sale herein which approval is to be obtained within 8 months from the date hereof, in default whereof, this Agreement shall be deemed to be annulled whereupon all monies paid by the purchaser to the vendor shall be refunded within fourteen (14) days from the date of receipt of non-approval from the said committee, and …..

Of crucial importance, would be cl. 16 of the written agreement where "time shall be of the essence of this agreement." Being prudent purchasers, the respondents through their solicitors Messrs Gulam & Wong made numerous oral and written requests for information in regard to the status of the

application to the foreign investment committee. The written requests by Messrs Gulam & Wong were dated 13 January 1998 and 17 February 1998 respectively and they were similarly worded and the letter dated 13 January 1998 would now be reproduced by way of an example:

GHP/343/97/st

13th January 1998

Eastacres Development Sdn. Bhd.,
Lot 3606, SS12/1, Subang Jaya,
47500 Petaling Jaya,
Selangor Darul Ehsan.

Dear Sirs,

Re: Sale and Purchase Agreement dated 29th January 1993
Land: Agricultural Lot at Mukim Kenaboi, District of Jelebu, Lot No. 544

We refer to the above matter.

We act on behalf of the purchasers, Ms. Fatimah bte Mutallip & Mr. Goh Kuk Chuan/Abdul Malik bin Abdul Goh.

We refer to the Sale and Purchase Agreement stated wherein you are the vendor in the sale and purchase transaction of the land known as Lot No. 544 located at Mukim Kenaboi, District of Jelebu. We seek your clarification on the following matter(s):-

(1) Pursuant to Clause 6 (a) of the said Agreement (at page 3):

(a) kindly inform whether any application has been made to acquire (obtain) the approval of the Foreign Investment Committee required therein;

(b) if so, kindly inform the status of the said application;

(c) kindly also forward to us as soon as possible copies of any application made to obtain the necessary approval;

(2) Pursuant to Clause 6 (b) of the said Agreement (at page 3):

(a) kindly inform whether a separate document of title of the said piece of land has been issued; and

(b) if so, kindly forward the same to us as soon as possible.

Yours faithfully

Sgd. (Illegible).

A reminder dated 11 March 1998 was also sent by Messrs Gulam & Wong and it was worded thus:

TKS/tss/343/97/st 11th March 1998
REMINDER

Eastacres Development Sdn. Bhd.
21st Floor, Plaza Raja Chulan,
8, Jalan Raja Chulan,
50200 Kuala Lumpur
Attn: Mr. Loh Ah Lek

Dear Sirs,

Re: Sale and Purchase Agreement dated 29th January 1993
Land: Agricultural Lot at Mukim Kenaboi, District of Jelebu; Lot No. 544
Purchasers: Ms Fatimah bte Mutallip & Mr Goh Kuk Chuan/Abdul Malik bin Abdul Goh

We refer to the above matter and to our letter dated 17th February 1998.

We note that to date we have not received any reply to our letter. Please let us have your reply to our query therein soonest possible.

Yours faithfully,

Sgd. (Illegible).

The appellant dragged its feet and responded negatively, by letter dated 16 May 1998, in these words:

EASTACRES DEVELOPMENT SDN BHD
Level 21, Plaza Raja Chulan, 8 Jalan Raja Chulan
50200 Kuala Lumpur

Your Ref : TKC/tss/33/97/st

Our Ref : ED/FH/F/544

Date: 16 May 1998

Received 22 MAY 1998
GULAM & WONG
Advocates & Solicitors J.B.

M/S Gulam & Wong
Advocates & Solicitors
Suite 1103-6, 11th Floor
Johor Tower (Tropical Inn)
15 Jalan Gereja
80100 Johor Bahru

Dear Sir/Madam

FOREST HILLS COUNTRY RESORT FARMSTEAD
LOT 544
PURCHASERS: FATIMAH BTE MUTALIP &
GOH KUK CHUAN/ABDUL
MALIK BIN ABDUL GOH

We refer to your letter dated 11 March 1998 and (be) inform(ed) of the following:-

1. that Foreign Investment Committee will not approve the non-citizen's acquisition for sale of agriculture land; and

2. that the individual title of the abovementioned has not been issued.

Thank you.

Yours faithfully,

EASTACRES DEVELOPMENT SDN BHD
Sgd. (Illegible)
Authorised Signatory

/c.

But the appellant did not produce documentary proof to show that the appellant had made concerted attempts to procure the approval of the foreign investment committee within the scope and ambit of cl. 6(a) of the written agreement. The respondents stand were quite simple: the appellant had not only failed to obtain the approval of the foreign investment committee, it had in fact failed to take positive steps to apply to the foreign investment committee in the first place.

The respondents sought for the refund of the total sum of S$23,100 in Singapore currencies that were paid under the written agreement pursuant to cl. 6 (a) thereof. By letter dated 26 May 1998, Messrs Gulam & Wong acting for the respondents wrote a notice of demand for the refund of that sum in these words:

26th May 1998
A.R. REGISTERED
CERTIFICATE OF POSTING

Eastacres Development Sdn. Bhd.
Level 21, Plaza Raja Chulan,
8 Jalan Raja Chulan,
50200 Kuala Lumpur.

a Dear Sirs,

Re: Notice of Termination of Sale & Purchase of Agreement Dated 29/1/93
Land: Agricultural Lot at Mukim Kanaboi, District of Jelebu, Lot No. 544
Purchasers: Fatimah bte Mutalip & Mr. Goh Kuk Chuan/Abdul Malik bin
b **Abdul Goh**
Vendor: Eastacres Development Sdn. Bhd.

We refer to the above matter and your letter dated 16/5/1998.

We are instructed by our clients that you have failed, neglected and/or refused
c to apply for and/or take any steps towards procuring the approval by Foreign Investment Committee within 8 months from the date of the above Agreement *ie*, on or before 29th September 1993, pursuant to clause 6(a) and (b) of the above Agreement.

We are also instructed that upon such failure and/or upon obtaining the non-
d approval from the Foreign Investment Committee you have failed, neglected and/or refused to refund all monies paid to you by our clients, which amounts to Singapore Dollars (S$) 23,100.00.

In the circumstances you have left our clients with no alternative but to treat your aforesaid breach as a repudiation of the said Sales and Purchase
e Agreement. Our clients hereby accept your repudiation as of 29th September 1993.

We are instructed, therefore, to demand from you, which we hereby do, that you pay to our clients or to us as solicitors for our clients, the sum paid to you amounting to S$23,100.00, together with interests thereon at 8% p.a. from
f 29th March 1993 to date, and our legal costs.

TAKE NOTICE that unless our clients or we receive the aforesaid sum from you within seven (7) days from the receipt hereof, we have firm instructions from our clients to institute legal proceedings against you without further recourse to you, in which event you will be liable for all costs incurred thereon.

g TAKE NOTICE that a copy of this NOTICE is also sent to you by Certificate of Posting.

Yours faithfully,

Sgd. (Ilegible)

h

c.c.

Puan Fatimah bte Mutalip &
Encik Abdul Malik K.C. Goh,
Blk. #06-198, Balam Road,
i Singapore 370021.

but the response was cold. The appellant refused to refund that sum. The respondents held the views that they were, at all times, ready, willing and able to perform their obligations under the written agreement. It was averred that the respondents suffered loss and damage comprising of:

PARTICULARS OF LOSS AND DAMAGE

Deposit paid on or about 14th January 1993	S$17,000.00
Part payment of the purchase price	S$ 6,100.00
	S$23,100.00
Cost for drawing up the said Agreement	RM 720.00.

The respondents then claimed for the following prayers:

(1) rescission of the written agreement;

(2) repayment of S$23,100 in Singapore currencies or its equivalent in Ringgit Malaysia at the date of the judgment;

(3) damages of RM720;

(4) interest at the rate of eight per centum (8%) per annum from 29 September 1993 to the date of payment;

(5) costs; and

(6) other orders and relief that this Honourable court deems fit and just to grant.

The appellant proceeded with the earthworks without obtaining the approval of the Jabatan Alam Sekitar and quite naturally the appellant was ordered to stop work. By letter dated 17 February 1993, the Jabatan Alam Sekitar ordered the earthworks to stop since the environmental impact assessment report had not been obtained. In that letter too, the Jabatan Alam Sekitar drew the attention of the appellant to s. 34A(6) and s. 34A(8) of the Environmental Quality (Amendment) Act 1985 and ordered the appellant to explain within twenty one (21) days from the date of the letter as to why the earthworks were carried out. The Jabatan Alam Sekitar, without mincing words, threatened prosecution in a court of law if the appellant refused to respond within the stipulated time frame. That letter from the Jabatan Alam Sekitar was worded thus:

JABATAN ALAM SEKITAR
NEGERI MELAKA/NEGERI SEMBILAN,
TINGKAT 2, GRAHA MAJU,
JALAN TAN CHAY YAN,
75300 MELAKA

Rujuk Tuan:
Rujuk Kami AS(M/NS)800 NS/01(10)
Tarikh: 17 Februari 1993

AMARAN

Received 24 FEB 1993
Pengurus Besar

Eastacres Development Sdn. Bhd.
Lot 3606, SS 12/1, Subang Jaya
47500 PETALING JAYA
(UP: Cik Rita Nair)
Tuan,

Pembangunan Projek Forest Hill Country Resort
Di Mukim Kenaboi, Daerah Jelebu, Negeri Sembilan

Adalah saya merujuk kepada perkara tersebut di atas dan menyusuli surat Jabatan ini bilangan AS 1024/1/17 Jld.5(58) bertarikh 19 Mac 1992 mengenai perkara yang sama.

2. Jabatan ini telah dimaklumkan bahawa pihak tuan telahpun memulakan kerja-kerja tanah bagi projek tersebut di atas. Sila ambil perhatian bahawa sebarang kerja-kerja tanah dan aktiviti pembangunan tidak boleh dimulakan di tapak cadangan ini sebelum laporan E.I.A. cadangan projek berkenaan diluluskan oleh Ketua Pengarah Alam Sekeliling.

3. Jabatan ini menarik perhatian tuan sekali lagi tentang kehendak Seksyen 34A(6) dan (8) Akta Kualiti Alam Sekeliling (Pindaan) 1985 yang memperuntukkan seperti berikut:-

(a) Seksyen 34A(6)

"Sesiapa yang bermaksud hendak menjalankan sesuatu aktiviti yang ditetapkan tidak boleh menjalankan aktiviti itu sehingga laporan yang dikehendaki dikemukakan di bawah Seksyen ini kepada Ketua Pengarah telah dikemukakan dan diluluskan", dan

(b) Seksyen 34A(8)

"Seseorang yang melanggar Seksyen ini adalah melakukan suatu kesalahan dan boleh dikenakan denda tidak lebih daripada sepuluh ribu ringgit atau penjara selama tempoh tidak lebih daripada dua tahun atau kedua-duanya dan denda tambahan satu ribu ringgit bagi tiap-tiap hari kesalahan itu diteruskan selepas disampaikan kepadanya suatu notis yang diberi oleh Ketua Pengarah mengkehendakinya mematuhi tindakan yang dinyatakan di dalamnya."

4. Dengan ini pihak tuan dikehendaki memberi penjelasan tentang kerja-kerja tanah yang telah dijalankan di tapak tersebut kepada pejabat ini dalam tempoh 21 hari dari tarikh surat ini.

5. Sila ambil perhatian bahawa Jabatan ini tidak teragak-agak mengambil tindakan mahkamah terhadap pihak tuan sekiranya pihak tuan tidak memberi sebarang maklumat bertulis mengenai perkara ini dalam tempoh yang telah ditetapkan.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(ABU HASAN BIN MOHD ISA)
Pengarah
Jabatan Alam Sekitar
Negeri Melaka dan Negeri Sembilan

s.k.:

i) Pentadbir Tanah Daerah
Pejabat Tanah Jelebu
71600 Kuala Klawang
NEGERI SEMBILAN DARUL KHUSUS
(Ruj. Tuan bil.(7)dlm.PTJ.354/101/89/01 Jld.11
bertarikh 21.4.1992).

In developing 2,800 acres of land for homestead resort style living in the Mukim of Kenaboi, in the district of Jelebu, where the respondents were interested in purchasing Lot 544 measuring approximately two (2) acres, the importance of the environmental impact assessment report can never be underestimated. The Jabatan Alam Sekitar in its letter dated 28 May 1993 addressed to the State Secretary of Seremban, Negeri Sembilan with a copy to the appellant as seen at p. 83 to p. 84 of the appeal record conveyed the message that it had no objections to the project proposed by the appellant subject to certain conditions as stated in the enclosure annexed thereto. That enclosure itemised and contained thirty six (36) conditions imposed by the "Ketua Pengarah Kualiti Alam Sekeliling, Malaysia" dated 28 May 1993 as seen at p. 85 to p. 90 of the appeal record. To the appellant the conditions imposed by the Jabatan Alam Sekitar had the effect of making it impossible to continue with the project as planned. The appellant engaged the services of consultant engineers, namely, Zaidun-Leeng Sdn Bhd, to determine the feasibility of continuing with the project. In its report dated September 1997, the message conveyed by Zaidun-Leeng Sdn Bhd was loud and clear: it would be quite difficult to continue with the project. Towards the end of its report, Zaidun-Leeng Sdn Bhd had this to say (see p. 74 of the appeal record):

A more recent review carried out by another planner M/s. Site Concept Internatural (SCI) also voiced similar concern. It was indicated that there is no possibility of continuing with the planned Forest Hills Development as the original layout is both environmentally and technically unfeasible. SCI has also indicated that it is impossible to attempt to build these lots, facilities and infrastructure(s) as designed due to the points listed below.

(1) To grade the existing steep terrain in the (manner) (indicated) on the plans will result in unstable and dangerous slope conditions.

(2) 70% of the lots as laid out are on (high) or steeper slopes and are essentially unbuildable.

(3) Access to many of the lots is impossible because the roads as shown are moving vertically up and down the slope at undrivable grades.

It seemed to me that Zaidun-Leeng Sdn Bhd in its report did not outrightly rule out the impossibility of carrying out the project. Rather, according to Zaidun-Leeng Sdn Bhd "the original layout(s) have to be revised taking into consideration the environmental and technical requirement(s)." I can do no better than to reproduce the final analysis of Zaidun-Leeng Sdn Bhd's report:

Conclusion

In view of the above stated constraints and the difficult terrain condition(s) it is our opinion that the original layout(s) have to be revised taking into consideration the environmental and technical requirement(s).

The Decisions Of The Sessions Court

Two decisions were handed down by the learned judge of the sessions court in favour of the respondents and they were:

(a) In granting the respondents a summary judgment under O. 26A r. 1 of the Subordinate Courts Rules 1980 ("SCR") against the appellant upon the respondents' application for summary judgment as seen at p. 22 to p. 23 of the appeal record, the order of the learned judge of the sessions court dated 23 December 1998 was worded as follows:

DALAM MAHKAMAH SESYEN DI JOHOR BAHRU
DALAM NEGERI JOHOR DARUL TAKZIM, MALAYSIA
SAMAN NO. 52-2817 TAHUN 1998(3)

ANTARA

1. FATIMAH BTE MUTALLIP
2. GOH KUK CHUAN/ABDUL MALIK ABD. GOH … PLAINTIF-PLAINTIF

DAN

EASTACRES DEVELOPMENT SDN. BHD. … DEFENDAN

DI HADAPAN PUAN SITI MARIAH
BT HJ AHMAD, HAKIM KANAN
MAHKAMAH SESYEN,
JOHOR BAHRU.

DI MAHKAMAH TERBUKA
PADA 23HB DISEMBER 1998

PENGHAKIMAN

ATAS PERMOHONAN PLAINTIF-PLAINTIF PERTAMA DAN KEDUA melalui Notis Permohonan bertarikh 12hb Ogos 1998 (Lampiran 5) yang dihadapkan untuk pendengaran pada 11hb November 1998 dalam kehadiran Encik Tho Kam Chew (bersama dengannya Cik Tan Siew Siew) peguam bagi Plaintif-Plaintif Pertama dan Kedua dan Encik Wong Hok Chong peguam bagi Defendan DAN SETELAH MEMBACA Notis Permohonan tersebut, Afidavit dan Afidavit Balasan Fatimah Bte Mutallip (P) dan Goh Kuk Chuan/Abdul Malik Abd. Goh masing-masing diikrarkan pada 10hb Ogos 1998 (Lampiran 5A) dan 11hb September 1998 (Lampiran 8) dan Afidavit-Afidavit Lim Kee Seng @ Ning Soy Tee masing-masing bertarikh 8hb September 1998 (Lampiran 7) dan 10hb September 1998 (Lampiran 9) DAN SETELAH MENDENGAR hujahan-hujahan peguam-peguam tersebut dan Permohonan ini ditangguhkan untuk keputusan pada hari ini dalam kehadiran Encik Tho Kam Chew peguam bagi pihak Plaintif yang juga menyebut bagi pihak peguamcara Defendan ADALAH DIPERINTAHKAN BAHAWA permohonan Plaintif-Plaintif Pertama dan Kedua untuk penghakiman terus dibenarkan terhadap Defendan menurut Aturan 26A Kaedah 1, Kaedah-Kaedah Mahkamah Rendah 1980 dengan kos DAN ADALAH JUGA DIPERINTAHKAN seperti berikut:-

(1) Perjanjian jualbeli antara Plaintif-Plaintif Pertama dan Kedua dan Defendan bertarikh 29hb Januari 1993 dibatalkan;

(1) Defendan mengembalikan wang berjumlah Dolar Singapura (S$) 23,100-00 atau imbangan dalam Ringgit Malaysia (RM) pada tarikh penghakiman kepada Plaintif-plaintif Pertama dan Kedua;

(2) Defendan membayar kepada Plaintif-Plaintif Pertama dan Kedua gantirugi berjumlah RM720.00;

(3) Defendan membayar kepada Plaintif-Plaintif Pertama dan Kedua faedah pada kadar lapan peratus (8%) setahun daripada 29hb September 1993 sehingga tarikh pembayaran;

(4) Defendan membayar kos bagi permohonan ini dan keseluruhan tindakan kepada Plaintif-Plaintif Pertama dan Kedua.

Bertarikh pada haribulan 1999

...

Pendaftar
Mahkamah Sesyen
Johor Bahru

Deraf untuk diluluskan,

t.t.	t.t.
...	...
Tetuan Gulam & Wong	Tetuan Wong Choo & Partners
Peguamcara bagi Plaintif	Peguamcara bagi Defendan

Penghakiman ini telah difailkan oleh Tetuan Gulam & Wong Peguambela dan Peguamcara yang beralamat di Bilik 1103-1106, 11th Floor, Johor Tower, 15, Jalan Gereja 80100 Johor Bahru, Peguamcara bagi Plaintif-Plaintif. (TKC/TSS/343/97/ns).

(b) In dismissing the appellant's application for security for costs to be paid by the respondents as seen at p. 24 to p. 25 of the appeal record, the order of the learned judge of the sessions court dated 23 December 1998 was worded thus:

DALAM MAHKAMAH SESYEN DI JOHOR BAHRU
DALAM NEGERI JOHOR DARUL TAKZIM, MALAYSIA
SAMAN NO. 52-2817 TAHUN 1998(3)

ANTARA

1. FATIMAH BTE MUTALLIP
3. GOH KUK CHUAN/ABDUL MALIK ABD. GOH … PLAINTIF-PLAINTIF

DAN

EASTACRES DEVELOPMENT SDN. BHD. … DEFENDAN

DI HADAPAN PUAN SITI MARIAH BTE
HJ AHMAD, HAKIM KANAN,
MAHKAMAH SESYEN,
JOHOR BAHRU.

DI MAHKAMAH TERBUKA
PADA 23HB DISEMBER 1998

PERINTAH

ATAS PERMOHONAN DEFENDAN melalui Notis Permohonan bertarikh 16hb September 1998 (Lampiran 12) yang dihadapkan untuk pendengaran pada 11hb November 1998 dalam kehadiran Encik Tho Kam Chew (bersama

dengannya Cik Tan Siew Siew) peguam bagi Plaintif-Plaintif Pertama dan Kedua dan Encik Wong Hok Chong peguam bagi Defendan **DAN SETELAH MEMBACA** Notis Permohonan tersebut, Afidavit Lim Kee Seng @ Ning Soy Tee yang diikrarkan pada 8hb September 1998 (Lampiran 12A) dan Afidavit Fatimah Bte Mutallip (P) dan Goh Kuk Chuan/Abdul Malik Abd. Goh yang diikrarkan pada 22hb September 1998 (Lampiran 13) **DAN SETELAH MENDENGAR** hujahan-hujahan peguam-peguam tersebut dan Permohonan ini ditangguhkan untuk keputusan pada hari ini dalam kehadiran Encik Tho Kam Chew peguam bagi Plaintif-Plaintif Pertama dan Kedua yang juga menyebut bagi pihak peguamcara Defendan **ADALAH DIPERINTAHKAN BAHAWA** permohonan Defendan untuk jaminan kos ditolak dengan kos.

Bertarikh pada haribulan 199 .

...
Pendaftar
Mahkamah Sesyen
Johor Bahru

Deraf untuk diluluskan,

t.t. t.t.
... ...
Tetuan Gulam & Wong Tetuan Wong Choo & Partners
Peguamcara bagi Plaintif-Plaintif Peguamcara bagi Defendan

Perintah ini telah difailkan oleh Tetuan Gulam & Wong Peguambela dan Peguamcara yang beralamat di Bilik 1103-1106, 11th Floor, Johor Tower, 15 Jalan Gereja, 80100 Johor Bahru, Peguamcara bagi Plaintif-Plaintif. (TKC/TSS/343/97/ns)

Aggrieved by the decisions of the learned judge of the sessions court, the appellant lodged an appeal covering both decisions to this court as reflected in encl. 2.

Order 26A r. 1(1) of the SCR states as follows:

> Where in an action to which this rule applies a statement of claim has been served on a defendant the plaintiff may, on the ground that defendant has no defence to a claim included in the summons, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

and its scope is certainly wide as it allows for the speedy disposal of cases which are uncontested, just like the present appeal. Since the appellant failed to obtain the approval of the foreign investment committee for the sale of Lot 544 within a period of eight (8) months from the date of the written agreement,

the respondents were entitled to repudiate the written agreement bearing in mind that time was the essence of the written agreement. Order 26A r. 1(1) of the SCR is a saving devise of a sort. It saves time and money since there would not be any full trial.

Summary procedure would certainly apply in the following situations:

(1) in a breach of contract (*Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 – particularly a breach of scholarship agreement);

(2) in regard to a master recourse agreement (*Maybank Finance (Singapore) Ltd v. Yap Thiam Sen & Anor* [1991] 1 MLJ 204);

(3) in regard to a building contract where there were cross-claims against the builder (*Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57);

(4) in a loan agreement where it is really and truly unarguable (*American Express International Banking Corporation v. Tan Loon Swan* [1992] 1 MLJ 727; and *Sabah Development Bank Bhd v. SKBS (Sabah) Sdn Bhd & Ors* [1992] 1 MLJ 454);

(5) in a friendly loan, where the loan is openly admitted then the money lending action can summarily be disposed of (*Subramaniam Dhanapakiam v. Ghaantimathi* [1991] 2 MLJ 447 and it is interesting to note that in *Wong Kim Fatt v. Yong Kwet Yin* [1996] 1 BLJ 444, [1996] 1 AMR 419, [1996] 1 MLJ 45, I said that an affidavit evidence by a party in the action would be sufficient to rebut the presumption of money lending under s. 3 of the Moneylenders Act 1951);

(6) in an income tax action, the certificate of the inland revenue department to the effect that a defendant owed the amount of income tax can no longer be questioned and on the basis of that certificate, a summary judgment must be given (*Government of the Federation of Malaysia v. Lee Tain Tshung* [1992] 1 MLJ 629).

Since time was an essence of the contract and time had run in favour of the respondents, the summary judgment which the learned judge of the sessions court gave in favour of the respondents was rightly and correctly given. This was my judgment and I so hold accordingly. In *Hare v. Nicoll* [1966] 2 QB 130, the court there discharged the contract when payment that was to be made by a certain date was not adhered to. Basically the question whether or not time would be the essence of the contract for the sale of goods depends upon the terms of the contract itself and this seems to be the views of the English

judges (*Hartley v. Hymans* [1920] 3 KB 475 and the cases cited therein). Time too was held to be the essence of the contract in the following cases:

(1) *Tilley v. Thomas* [1867] LR 3 Ch App 61 involving the purchase of a leasehold house purchased for immediate occupation;

(2) *Smith v. Hamilton* [1951] Ch 174; *Harold Wood Bricks Co Ltd v. Ferris* [1935] 2 KB 198 and *Bernard v. Williams* [1928] 44 TLR 437 involving the sale of business land or premises;

(3) *Harrington v. Browne* [1917] 23 CLR 297 pertaining to mercantile contracts;

(4) *Williams v. Greatex* [1957] 1 WLR 31 pertaining to the sale of property of a fluctuating nature; and

(5) *Loh Boon Siew v. Chin Kim & Anor* [1972] 1 MLJ 139 involving the sale of a land.

In *Jaafar bin Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24, the then Supreme Court held that the date stipulated and itemised in the conditional contract had to be strictly adhered to and that time could not simply be extended by reference to equitable principles. In so holding the then Supreme Court through Mohamed Azmi SCJ applied vigorously the case of *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47.

In *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151 FC at p. 153, Salleh Abas FJ (as he then was) delivering the judgment of the then Federal Court observed in fine language:

> In modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. (See *Lord Simon of Glaisdale in United Scientific v. Burnley Council* [1978] A.C. 904, 940 and 944). In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See *9 Halsbury's Laws of England*, 4th edition, paragraph 538, page 370).

In the present appeal, the respondents chose to treat the written agreement as having been repudiated and so the respondents were rightly entitled as decided by the learned judge of the sessions court to summary judgment.

I will now examine the crucial issue pertaining to the doctrine of frustration at some length.

Force Majeure Or Frustration

The appellant relied heavily on the report prepared by Zaidun-Leeng Sdn Bhd and through Mr. Wong Hok Chong – the learned counsel for the appellant, it was argued that the report by Zaidun-Leeng Sdn Bhd should be categorised as an expert opinion evidence and, consequently, any challenge on that expert opinion should be pursued in open court and not summarily disposed of as was done by the learned judge of the sessions court. In *SM Appaduray & Anor v. R. Ananda & Anor* [1982] 1 MLJ 292, VC George J (as he then was) was confronted with a boundary dispute in regard to the survey and in the context of an application under O. 14 of the Rules of the High Court 1980 ("RHC") this was what he had to say (see p. 293 of the report):

> In my view the challenge to the accuracy of the survey creates a triable issue as to the positioning of the boundaries of the two lots.

and using this passage as a leverage, it was argued that summary judgment ought not to be granted in view of the expert opinion report of Zaidun-Leeng Sdn Bhd. With respect, this submission went too far and was certainly made without analysing the facts of the present appeal. To me, the case of *SM Appaduray & Anor v. R. Ananda & Anor (supra)* has no relevance to the present appeal. That case was in respect of the position of the boundary of the land which must surely be dependent on the opinion of the surveyors. In the present appeal, the respondents' claims were based purely on the factual aspects of cll. 6 and 16 of the written agreement, namely: whether the appellant had obtained the necessary approval of the foreign investment committee within eight (8) months from the date of the written agreement. The determination of this simple factual question was not dependent on any expert evidence. It must be borne in mind that the appellant as a developer of that 2,800 acres of land must comply with all the rules and regulations governing the development of hilly terrain before embarking with its earthworks and before offering homestead lots for sale. The environmental impact assessment report must be approved by the Jabatan Alam Sekitar and all the thirty six (36) conditions imposed by the Ketua Pengarah Kualiti Alam Sekeliling, Malaysia must be complied with and after all these arduous exercises have been fulfilled, the appellant can then safely embark with its earthworks and offer homestead lots for sale to the members of the public. Instead, the appellant in its unholy haste proceeded with its earthworks and sold Lot 544 measuring approximately two (2) acres to the respondents. The earthworks that were carried out by the appellant was ordered to be stopped and the Jabatan Alam Sekitar imposed the thirty six (36) stringent conditions. Time, being the essence of the written agreement between the appellant and the respondents, went ticking by. Precious time was wasted. Had the appellant

obtained the approval of the Jabatan Alam Sekitar before starting the earthworks and before putting the property in the market for sale to the members of the public, the predicament faced by the appellant would be non-existent. The report put up by Zaidun-Leeng Sdn Bhd showed the need to comply with the environmental and technical requirements of the Jabatan Alam Sekitar. To argue that the report by Zaidun-Leeng Sdn Bhd made the development of the homestead project undertaken by the appellant as an impossibility would be to overlook the conclusion arrived at by Zaidun-Leeng Sdn Bhd and that conclusion showed that the project was still feasible provided the original layouts have been revised to comply with the environmental and technical requirements.

The pertinent question to pose would be this: can the doctrine of frustration be invoked on the facts of the present appeal? A contract, simply put, can be frustrated and is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. The House of Lords in *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corpn Ltd* [1942] AC 154 categorically stated that the doctrine "is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made". Section 57(2) of the Contracts Act 1950 enacts the doctrine in these words:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The Contracts Act 1950 do not define the word "impossible" and as I see it there can be two instances of frustration:

> when a contract to do a certain act becomes either impossible or unlawful.

Frustration too must occur after the formation of the contract or to put it differently and with some measure of style: the frustration should be supervening and subsequent to the formation of the contract. But a word of caution must be made here: a "self induced frustration" will not discharge a party of his contractual obligations under the law (*Maritime National Fish Ltd. v. Ocean Trawlers Ltd* [1935] AC 524; and *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257).

When a contract is discharged by frustration, the outcome is simple: the contract does not become merely voidable but it is brought to an end forthwith and automatically (*Hirji Mulji v. Cheong Yue Steamship Co Ltd* [1926] AC 497; and *Berney v. Tronoh Mines Ltd* [1949] MLJ 4). Section 57(2) of the Contracts Act 1950 enacts that such a contract "becomes void" and restitutionary remedies are provided for under ss. 57(3) and 66 of the Contracts Act 1950 thereof.

The effect of frustration at common law is this: it is to release parties to a contract of any future obligations but legal rights already accrued or money paid were left intact. A few examples would be an eye opener. In *Chandler v. Webster* [1904] 1 KB 493 for instance, the court there held that the plaintiff not only could not recover the advance already paid but was also held to be liable to pay the balance which was due before the event frustrating the contract took place. The law as set out in *Chandler v. Webster (supra)* had been criticised to be harsh and inhumane and it was fine tuned by the House of Lords decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. *Fibrosa*'s case briefly held that an action for money had and received was said to be quasi-contractual in nature and its recovery was on the ground that there was a total failure of consideration. In England, as a result of the *Fibrosa*'s case, legislative intervention became active and it crystallised in the form of the Law Reform (Frustrated Contracts) Act 1943 which allowed the courts greater and wider discretion in dealing with frustrated contracts. In Malaysia, the change was in tandem. The re-enactments of ss. 15 and 16 of the Civil Law Act 1956 amply set out the consequences of frustration.

It is not that difficult to determine the effect of frustration. One must always have regard to the intention of the parties as construed from the terms of the contract (*Chan Buck Kia v. Naga Shipping & Trading Co Ltd* [1963] 29 MLJ 159). And in a contract where there is a force majeure clause, the court must be cautious and must look into the construction of the clause in order to determine whether such a clause is wide enough to cover the contingency in question (*Hong Guan & Co Ltd v. R Jumabhoy & Sons Ltd* [1960] 26 MLJ 141).

Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 at p. 729 laid down the test in determining as a question law whether a particular contract has been discharged by frustration and this was what his Lordship said:

> ... frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

and this particular test was applied in *Khoo Than Sui v. Chan Chiau Hee* [1976] 1 MLJ 25 and *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 to reject a defence of frustration. The House of Lords even went to the extreme and sounded a note of warning in *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH* [1962] AC 93 to the effect that the doctrine of

frustration must be applied within a small compass-a narrow limit. Viscount Simonds held the view that the nature of the contract should be "fundamentally altered" before it can be said that the contract has been frustrated and incapable of performance. His Lordship at p. 112 of the report observed that:

> ... it does not automatically follow that, because one term of a contract, for example that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated.

In my judgment, the doctrine of frustration must be confined to narrow circumstances for the simple reason that commercial bargains should not be lightly brushed aside upon a mere change of circumstances. It must not be forgotten that the doctrine of frustration is basically dependent on the facts of each case (*Lim Kim Som v. Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393 at 403). Factually speaking, Mr. Tho Kam Chew, learned counsel for the respondents, submitted that it was an after thought on the part of the appellant in raising the defence of force majeure or frustration. There was no event supporting that doctrine at all, so the submission went. Indeed the letter dated 17 February 1993 as reproduced somewhere in this judgment and the letter dated 28 May 1993 that was addressed to the State Secretary of Seremban, Negeri Sembilan from the Jabatan Alam Sekitar and with a copy to the appellant as alluded to in the early part of this judgment, made no reference at all to the doctrine of frustration. It must also be stressed that the letter dated 26 January 1996 as seen at p. 71 of the appeal record emanating from the appellant and addressed to Messrs Tay & Partners with a copy to the respondents made no mention at all that an event of force majeure or frustration had occurred. The letter dated 26 January 1996 was exhibited in the appellant's affidavit in reply as seen at p. 31 to p. 35 of the appeal record and marked as exh. "ED2" thereof and it was worded as follows:

> EASTACRES DEVELOPMENT SDN BHD
> Lots 908-909, 9th Floor, Wisma HLA,
> Jalan Raja Chulan, 50200 Kuala Lumpur
>
> Your Ref: G4/A1(1) CEH
> Our Ref: EAC/FH/O/544
> Date: 26 January 1996
>
> TAY AND PARTNERS
> Advocates & Solicitors BY HAND
> Suite 6.01, 6th Floor, Plaza See Hoy Chan
> Jalan Raja Chulan
> 50200 Kuala Lumpur
>
> Dear Sir

FOREST HILL FARMSTEAD LOT NO 544
PURCHASERS: FATIMAH BTE MUTALLIP & GOH
KUK CHUAN/ABD MALIK ABD GOH

We refer to your letter dated 4 January 1996 and (be) inform(ed) of the following:

1. that FIC approval for the acquisition of the abovementioned property by the purchasers has not been obtained;

2. that the individual title to the said property has not been issued.

We also wish to inform that the stringent requirements by the authorities regarding hillslope development have placed constraints on the development resulting in the re-planning of the project.

Meanwhile we are actively resolving the various issues arising to facilitate the successful development of the project and shall brief your clients on the project development as soon as they are finalised.

Under the circumstances we trust that your clients will bear with us during the interim (period) and continue to extend their support to the project. Please contact us should you require further information on the aforementioned.

Thank you.

Yours faithfully
EASTACRES DEVELOPMENT SDN BHD
Sgd.
JANE YAP
Authorised Signatory

c.c. Fatimah Bte Mutallip
Goh Kuk Chuan/Abd Malik Abd Goh
Block 217, #01-77
Bedok North Street 1
Bedok Town Center
Singapore 1646

and this very letter merely stated, *inter alia*, that " ... stringent requirements by the authorities regarding hillslope development have placed constraints on the development ...." and the appellant confessed that " …. we are actively resolving the various issues arising to facilitate the successful development of the project …. " But this very letter did not disclose the impossibility on the part of the appellant to perform their obligations under the written agreement. This very letter too was dated **after** the date of the two letters relied upon by the appellant to establish their defence of force majeure or frustration, namely: the letter dated 17 February 1993 as seen at p. 69 to p. 70 of the

appeal record and reproduced in the early part of this judgment and the letter dated 28 May 1993 which was adverted to earlier and as seen at p. 83 to p. 91 of the appeal record. I must say something in regard to the letter dated 28 May 1993 and the best way would be to reproduce that letter and I will do so now, confining only to p. 83 to p. 84 of the appeal record:

JABATAN ALAM SEKITAR,
KEMENTERIAN SAINS, TEKNOLOGI DAN
ALAM SEKITAR, RAJA LAUT,
TINGKAT 12 & 13, WISMA SIME DARBY,
JALAN 50662 KUALA LUMPUR

Ruj. Tuan:
Ruj. Kami: AS(S)A50/011/300/008(43)
Tarikh: 28 Mei 1993

Y.B. Setiausaha Kerajaan Negeri
Pejabat Setiausaha Kerajaan Negeri Sembilan
Wisma Negeri
Jalan Dato' Abdul Malek
70503 SEREMBAN

Yang Berhormat,

Laporan Penilaian Kesan Kepada Alam Sekeliling (EIA) Bagi Cadangan Projek Pembangunan "Forest Hill Country Resort" Di Mukim Kenaboi, Daerah Jelebu Negeri Sembilan Darul Khusus

Saya dengan hormatnya ingin merujuk kepada perkara tersebut di atas.

2. Dimaklumkan bahawa, pihak Eastacres Development Sdn. Bhd. bercadang untuk membangunkan projek pembangunan bersepadu yang merangkumi pembangunan pelancongan, pertanian, perumahan 'homestead resort-style living', dan rekreasi di kawasan seluas 2,800 ekar (1,200 hektar) di Mukim Kenaboi, Daerah Jelebu Negeri Sembilan.

3. Jabatan Alam Sekitar telah menerima laporan EIA bagi cadangan projek tersebut yang dikemukakan oleh pemaju projek, Eastacres Development, bertarikh 4 November 1992 serta maklumat-maklumat tambahan yang dikemukakan semasa taklimat pada 02 Februari 1993 dan susulan kepada taklimat tersebut melalui surat-surat bil. rujukan PU/9205 (13) bertarikh 09 Februari 1993 dan PU/9205 (8) bertarikh 12 April 1993. Laporan EIA berkenaan telah dikaji dan dibincangkan di Mesyuarat Jawatankuasa Teknik EIA pada 12 Januari 1993, 29 April 1993 dan 11 Mei 1993. Setelah meneliti syor dan pandangan Jawatankuasa tersebut, saya mendapati isu ketara yang perlu diberi perhatian oleh pihak Yang Berhormat dalam mempertimbangkan projek tersebut adalah:-

(i) Pembangunan projek ini melibatkan pembukaan tanah yang luas di kawasan bukit dan dijangka akan menimbulkan masalah hakisan tanah, tebing runtuh dan banjir sekiranya langkah-langkah efektif tidak dilaksanakan. Dalam hal ini langkah-langkah pencegahan dan kawalan yang berkesan bagi mengelak berlakunya kejadian-kejadian ini perlu disediakan terlebih dahulu sebelum kerja-kerja pembukaan tanah dimulakan. Pelan terperinci berhubung dengan kerja tanah dan sistem peparitan bagi setiap kawasan yang hendak dibangunkan hendaklah disediakan dan dirujuk kepada Majlis Daerah Jelebu dan Jabatan Pengairan dan Saliran Negeri Melaka/Negeri Sembilan untuk persetujuan terlebih dahulu sebelum kerja tanah boleh dimulakan.

2. Saya dengan ini tiada halangan terhadap pelaksanaan projek tersebut tertakluk kepada syarat-syarat seperti di LAMPIRAN.

3. Sokongan dan kerjasama Yang Berhormat di dalam menjaga kualiti alam sekeliling kita untuk pembangunan berketerusan sangatlah dihargai.

Sekian. Terima kasih.

"BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.
(DR. ABU BAKAR BIN JAAFAR)
Ketua Pengarah Kualiti Alam Sekeliling
Malaysia

s.k.

Pengarah Urusan
Eastacres Development Sdn. Bhd.
Lot 3606, SS12/1, Subang Jaya
41750 PETALING JAYA

The categorical approval in the letter dated 28 May 1993 meant that the appellant could henceforth proceed to commence work on the project in accordance with the conditions stated therein. After receiving this very letter dated 28 May 1993 together with the conditions annexed thereto – numbering 36 in all and it would be too lengthy to reproduce in this judgment, the appellant proceeded to write to the respondents by letter dated 26 January 1996 as seen at p. 71 of the appeal record and as reproduced earlier seeking, *inter alia*, the continued support of the respondents for the project. Having received a copy of the letter dated 28 May 1993, the appellant failed to adduce evidence, documentary or otherwise, to show that work had been commenced or an attempt to commence work was undertaken on the project. No wonder the respondents through Mr. Tho Kam Chew vehemently pointed out that there

was no frustration at all in the present appeal and that the doctrine of frustration was hatched in a final attempt to avoid the written agreement. In my judgment, the doctrine of frustration has no place in the present appeal at all.

I will now refer to the letter dated 17 February 1993 that was reproduced in the early part of this judgment. At para. 1 of the letter dated 17 February 1993 there was reference to an earlier letter dated 19 March 1992 which was not produced by way of an exhibit in the affidavit of the appellant. The letter dated 19 March 1992 was certainly a date well before the date of the written agreement which was on 29 January 1993. The letter dated 17 February 1993 merely gave notice to the appellant not to commence work on the project pending the approval of the environmental impact assessment report by the Director General of Environment pursuant to s. 34A(6) and s. 34A(8) of the Environmental Quality (Amendment) Act 1985 – an old piece of legislation that was passed by Parliament before the written agreement was entered between the parties. There was nothing in the letter dated 17 February 1993 to show that work on the project must be stopped pending re-assessment of the project and yet the appellant in an affidavit affirmed by Lim Kee Seng @ Ning Soy Tee on 8 September 1998 saw it fit to depose at para. 8 to that effect and that paragraph would now be reproduced:

> 8. Pada dan lebih kurang pada tahun 1993, Kerajaan Malaysia telah memutuskan bahawa semua permajuan atas bukit, termasuk permajuan ini, dikehendaki dikaji semula oleh kementerian tertentu. Pada awalnya, kementerian tertentu telah mengeluarkan surat hentikerja bertarikh 17hb Februari 1993 kepada defendan untuk projek berkenaan sementara projek tersebut dikaji semula. Dilampirkan bersama-sama ini dan ditandakan sebagai ekshibit 'ED-1' adalah sesalinan surat tersebut.

To depose an affidavit conveying the wrong message must surely be construed as an attempt to hoodwink the court. One can't certainly make bricks out of straws and yet the appellant was trying to do so but to no avail.

It was part and parcel of my judgment that there was no frustration of the written agreement. As I said earlier the Jabatan Alam Sekitar gave its approval for the project and the conditions that were imposed cannot, per se, render the continuation of the project impossible as alleged. Even if the original layout plans have to be revised or modified as stated in the report of Zaidun-Leeng Sdn Bhd, that cannot, by any stretch of the imagination, prevent the project from being carried out to its final conclusion. This was my judgment and I so hold accordingly.

Now, even if I was wrong in my approach in regard to the doctrine of frustration and that that doctrine had been triggered off as alleged, the

respondents were still entitled to recover the full amount of the money that was paid to the appellant in Singapore currencies or its equivalent in Ringgit Malaysia. I am fortified in my view by a passage that appears in the judgment of Lord Atkin in *Fibrosa*'s case *(supra)* particularly at p. 55 of the report and this was what his Lordship said:

> Meanwhile, by the application of a general doctrine which is independent of the special contract and only comes into play when further performance of the latter is precluded, the man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to recover it back.

This was a classic case of the respondents contracting to purchase Lot 544 measuring approximately two (2) acres and whether the appellant had failed to deliver that land by reason of frustration, which was not the case here, or by the failure on the part of the appellant to obtain the necessary approval of the foreign investment committee within a certain framework of time, which was the case here, the respondents must be entitled to the full refund of those sums paid under the written agreement. The decisions of the learned judge of the sessions court in allowing summary judgment and in allowing the refund of those sums must be confirmed forthwith. This was my judgment and I so hold accordingly.

Security For Costs

Order 18 r. 1(1) of the SCR states as follows:

> (1) Where, on the application in Form 43 of a defendant to an action or other proceeding in a Sessions Court, it appears to the Court –
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or
>
> (c) subject to paragraph (2), that the plaintiff's address is not stated in the summons or other originating process or is incorrectly stated therein; or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order in Form 14 the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

and it gives a discretion to the court to order security for costs, having regard to all the circumstances of the case. Mohamed Dzaiddin J (now FCJ) in *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1986] 2 MLJ 310, particularly at p. 311 had this to say of the rule (its equivalent in the RHC):

> Order 23 rule 1(1) provides that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do.' 'These words have the effect of conferring upon the court the real discretion and indeed the court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.' (Supreme Court Practice 1985 Vol. 1 page 384). In exercising its discretion, it is clear that the court will have regard to all the circumstances of the case. For the circumstances, see per Lord Denning M.R. in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd* [1973] 2 All ER 273.

Further down the same page of the same judgment, his Lordship Mohamed Dzaiddin J (now FCJ) continued:

> However, in *Aeronave SPA & Anor v. Westland Charters Ltd. and Ors* [1971] 3 All ER 531, Lord Denning M.R. in his judgment at page 533 stated as follows:
>
> > I agree …that the rule does give a discretion to the court. In 1894 in *Crozat v. Brogden* Lopes L.J. said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high.
> >
> > It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order …. The ordinary rule still remains, that it is a matter of discretion ….

In my judgment, the circumstances of the present appeal did not warrant the respondents to give security for costs and no order shall be made in regard to security for costs.

The following considerations were taken into account in refusing the appellant's appeal in regard to the security for costs which the learned judge of the sessions court refused in the first instance:

(1) There was a likelihood nay a strong one for the respondents to succeed in their claim against the appellant (*Porzelack KG v. Porzelack (UK) Ltd* [1987] All ER 1074).

(2) There was a strong likelihood that the appellant will fail in their defence (*Crozat v. Brogden* [1894] 2 QB 30).

(3) The claims of the respondents were quite simple ; it rested on the failure of the appellant to obtain the approval of the foreign investment committee within eight (8) months from the date of the written agreement and it appeared that the application for security by the appellant was done oppresively – "so as to try and stifle a genuine claim" per Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273, 288.

(4) The appellant did not make any counterclaim against the respondents, and there were thus no necessity for this court to be satisfied that that counterclaim was a separate cause of action, distinct from the respondents' claim (*Asia Commercial Bank Ltd v. Kimling Trading Co Pte Ltd* [1983] 2 MLJ c xxxvii).

It must be borne in mind that the court must have regard to all the circumstances of the case so that the court will be able to exercise a real discretion to order security or otherwise (*Raman Chettiar v. Palaniappa Chettiar & Anor* [1939] MLJ 165; *Coldham v. The Raub Australian Gold Mining Co Ltd* [1940] MLJ 50; and *Ho Kai Neo (widow) and Chew Swee Yan v. Tan Kim Tee and Tan Kiem Tie Limited* [1940] MLJ 84). It would not be as a matter of course that security will be ordered against a foreign plaintiff – like the respondents in the present appeal (*Kasturi Palm Products v. Palmex Industries Sdn Bhd (supra)*). To me, there was a strong *prima facie* presumption that the appellant will fail in their defence, and on this ground alone the appellant's application for security and the appellant's appeal against the decision of the learned judge of the sessions court in refusing security should be dismissed forthwith (*Crozat v. Brogden (supra)*; and *Trident International Freight Services Ltd v. Manchester Ship Canal Co* [1990] BCLC 263, CA). It would certainly be unjust to order security for costs when the appellant had no defence to the respondents' claims at all (*Hogan v. Hogan (No. 2)* [1924] 2 Ir R 14).

For the reasons adumbrated above, I dismissed encl. 2 with costs.